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Reaping the Fruits of a Ripe Property Takings Challenge: Eliminating the Ripeness Problem in Facial Regulatory Takings Cases

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REAPING THE FRUITS OF A RIPE PROPERTY TAKINGS CHALLENGE: ELIMINATING THE RIPENESS PROBLEM IN FACIAL REGULATORY TAKINGS CASES*

I. INTRODUCTION

Currently, many American local governments and regulatory agencies face a variety of problems caused by sustained urbanization and a corresponding decrease of land available for development. These problems include shortages of affordable housing, decreasing amounts of land suitable for use as open space, a dearth of areas available for waste disposal and increasing air, noise, and water pollution. Furthermore, municipalities must combat these problems in an era when the federal government limits funds allotted to local government programs[1] and when the public staunchly opposes any form of increased taxation.[2]

In an effort to control these modern urban challenges at the lowest possible fiscal cost, municipalities and state governmental agencies have turned to their constitutionally granted police powers[3] to regulate the control and use of real property. But, if these regulations effectively convert

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1. For example, federal grants to state and local governments, expressed in 1982 constant dollars and accounting for the GNP deflator, for fiscal 1986 was $95 billion. The official estimate of the corresponding amount for 1988 was $84.1 billion. ADVISORY COMM'N ON INTERGOVERNMENTAL REL., SIGNIFICANT FEATURES OF FISCAL FEDERALISM 15 (1988). Thus, if the estimate for 1988 was accurate, federal funding of state and local government programs dropped by 12% over the last two years.

2. California's Proposition 13 (CAL. CONST. art. XIIIA (West. Cum. Supp. 1980)) provides one example of citizen's disfavor with increased state taxation. Passed by California voters in 1978, Prop. 13 created four new rules for taxation: 1) a 1% limit on property tax revenues; 2) limits to municipality assessments; 3) voter approval required for state government-sponsored tax increases in the future; 4) similar voter approval for local government-sponsored future tax increases. CAL. ASSEMBLY COMM'N. ON LOCAL GOV'T, THE IMPACT OF PROPOSITION 13 (THE JARVIS-GANN INITIATIVE) ON LOCAL GOV'T SERVICES AND FACILITIES 12 (1978).

3. U.S. CONST. amend. X reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

otherwise private property into land for public use without adequately compensating the landowner, then the government's action constitutes a taking under the fifth amendment of the United States Constitution.[4] When a municipality or state governmental agency enacts a regulation based on its police powers and causes a private landowner to lose his property rights in favor of a public use without compensation for the loss, a regulatory taking occurs.[5]

As local governments and state regulatory agencies[6] enact more land use regulations, courts spend increasing amounts of time trying to discover where pragmatic local action ends and regulatory takings begin.[7] Regulatory takings litigation is quite fact specific, and development of any steadfast rule of law in the area eludes many courts and legal theorists.[8] In short, no clear test has emerged to determine

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4. U.S. CONST. amend. V reads: "No person shall . . . be deprived of property, without due process of law; nor shall private property be taken for public use without just compensation." The fifth amendment's takings clause, also known as the just compensation clause, was made applicable to the states through the fourteenth amendment in Chicago, Burlington, & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

5. *See generally* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

6. The California Coastal Commission is an example of a state regulatory agency which enacts land use regulations. Through zoning laws and a dedication/exaction process, the commission regulates development and construction in the California Coastal Zone. For examples of suits challenging the commission's land use regulations, see Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628, *appeal dismissed*, 474 U.S. 915, *reh'g denied*, 474 U.S. 1027 (1985); Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982); Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

7. *See, e.g.*, Eamiello v. Liberty Mobile Home Sales, Inc., 208 Conn. 620, 546 A.2d 805 (1988) (mobile home park owner challenged City of Hartford's mobile home rent control statute); Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988); Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986), *cert. denied* 108 S. Ct. 1120 (1988) (city's mobile home rent control statute challenged by landowner); Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (landowner challenged city's open space regulation).

8. *See generally* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 RUTGERS L.J. 15 (1983); Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); Berger & Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOY. L.A.L.

when property regulation exceeds its scope and creates an unconstitutional taking.

Regulatory takings law becomes even more complex when a private landowner or representative group files suit in the form of a facial challenge of an alleged regulatory taking. In a property takings scenario, a facial challenge arises when an individual or representative group contends that the mere enactment of a regulation promulgated by a governmental agency or municipality constitutes a taking without just compensation.[9] Instead of clarifying the situation, recent United States Supreme Court decisions have only confused an already befuddled area of the law.[10] The nation's highest court has constructed an unpredictable and ambiguous "ripeness" standard which prevents the Court from analyzing the merits of many facial challenges of alleged regulatory takings.[11] This unclear standard inhibits public agencies from

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REV. 685 (1985); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1986); Falik & Shimko, *The "Takings" Nexus–The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988); Sax, *supra* note 5; Van Alstyne, *Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971); Williams, Smith, Siemon, Mandelker, & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1974) [hereinafter *Manifesto*].

9. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Kinzli v. City of Santa Cruz, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 830 F.2d 977 (9th Cir. 1987), *rev'd*, 841 F.2d 977 (9th Cir. 1988); Herrington v. County of Sonoma, 834 F.2d 1488 (9th Cir. 1987).

For cases in which the merits are analyzed ("as applied" challenges), the Supreme Court applies an "ad hoc, multiple factor" balancing test. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

10. *See Pennell*, 485 U.S. 1 (1988); *Keystone*, 480 U.S. 470 (1987); *Hodel*, 452 U.S. at 264 (1981); *Agins*, 447 U.S. 255 (1980).

11. *See generally* Bauman, *The Supreme Court Becomes Serious About Takings Law: The First Church, Keystone and Irving Cases*, 10 ZON. & PLAN. L. REP. 145 (1987).

"Ripeness" is a preliminary standing requirement that must be fulfilled before the Supreme Court will analyze the merits of a case. *See generally* Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967); American Motorcyclist Ass'n v. Watt, 543 F. Supp. 789, 793-95 (1982). In the regulatory property takings arena, the requirement is usually fulfilled only if an actual landowner proves that a regulation has unconstitutionally taken his property and if this landowner has ex-

serving the public welfare and also prevents private landowners from developing property at a fair profit.[12]

This comment reviews the state of American law concerning facial challenges of regulatory takings, focusing especially on cases where the Supreme Court has found a lack of ripeness, and proposes new criteria for determining the ripeness of a facial regulatory takings challenge. Special attention will be devoted to the latest in this line of cases, *Pennell v. City of San Jose*,[13] which highlights the problem created by the Court's untenable position.

Specifically, this comment asserts that the Court's arbitrary use of the ripeness doctrine prevents complete adjudication of important cases in this area of law. The proposed criteria seek to create a more consistent method for deciding these complex cases. Thus, landowners and regulatory bodies would mutually benefit since their rights would be more equitably defined.

II. BACKGROUND

A. *Basic Analysis for Regulatory Takings*

Before explaining the Court's underutilized regulatory takings test, the circumstances surrounding a facial challenge must be described.[14] A facial challenge arises when a landowner or representative group litigates the enactment of a regulation promulgated by a governmental agency or municipality. The property owner usually argues that the regulation itself effectuates an actual taking because it interferes with private economic interests.[15] With increasing regularity, the

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hausted his administrative remedies. *See also* Comment, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. J. PUB. L. 375 (1987) (comment reviews and summarizes the ripeness problem in facial and "as applied" regulatory takings challenges up to 1987).

12. *See generally Manifesto*, *supra* note 8, at 214.

13. 485 U.S. 1 (1988).

14. *See* Berger, *supra* note 8, at 745. In contrast with regulatory takings, a physical taking involves government action which physically intrudes upon private property or authorizes others to do so. For an example of the Court's analysis in a physical takings case, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

15. In such a scenario, the landowner claims that the interference with his property interests is so intrusive that the government action constitutes a taking. *See, e.g.*, *Pennell*, 485 U.S. 1 (1988); Nollan v. California Coastal Comm'n, 483 U.S.

Supreme Court has refused to review the merits of suits presenting facial challenges and has held such cases nonjusticiable for lack of ripeness.[16] Consequently, many governmental agencies are unsure of the validity of their particular land use regulations, such as rent control ordinances,[17] subsidence protection,[18] and general land use plans.[19]

In the event that the Court reaches the merits of a facial challenge, the standard test for determining whether the regulation creates a taking was developed in *Agins v. City of Tiburon*.[20] In *Agins*, the landowners argued that a city zoning ordinance, which dictated that appellants' land could only be used for five, single family dwellings on lots with a minimum size of one acre, constituted a taking without just compensation.[21] Affirming the California Supreme Court's decision, the United States Supreme Court held that, on its face, the city's ordinance did not take appellants' property without just compensation.

The *Agins* Court ruled that a regulatory taking would have occurred only if the ordinance did not substantially advance legitimate state interests or if the regulation denied an owner economically viable use of his land.[22] In *Agins*, the ordinance substantially advanced the legitimate government

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825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer, & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

16. *E.g.*, *Pennell*, 485 U.S. 1 (1988); *MacDonald*, 477 U.S. 340 (1986); *Williamson County*, 473 U.S. 172 (1985).

17. *E.g.*, *Pennell*, 485 U.S. 1 (1988); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983).

18. *E.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

19. *E.g.*, *MacDonald*, 477 U.S. 340 (1986); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

20. 447 U.S. 255 (1980).

21. *Id.* at 257.

22. Some theorists extend the Court's recent holding in *First English*, 482 U.S. 304 (1987) to overrule *Agins*. These theorists contend that, after *First English*, a taking of any kind regardless of its length must be compensated. *See, e.g.*, Berger, *supra* note 8, at 744. Conversely, others assert that *First English* applies only to cases of temporary takings. *See, e.g.*, Bauman, *supra* note 11.

In contrast, if the Court reaches the merits of a regulatory takings case, the analysis focuses on an ad hoc multi-factor balancing test. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

interest of discouraging premature conversion of open space land to more urban uses.[23] Further, the ordinance exemplified a valid use of the city's police power since the regulation protected Tiburon residents from the ill effects of urbanization.[24]

Tiburon's ordinance also fulfilled the second aspect of the test, allowing the owner to retain viable economic use of the land, since appellants' best use of their land had not been extinguished.[25] The Court also noted that the city's ordinance did not terminate the landowners' fundamental right of ownership because the Agins' remained free to pursue many profitable uses of their land by submitting a development plan to the city,[26] which had not yet been done.

Interestingly, the Court upheld Tiburon's ordinance but refused to analyze the specific merits of the case. The decision stated that appellants' land use challenge was not ripe since the Agins' had not yet applied to the city for any particular use of their land.[27] Thus, the ripeness problem kept the Court from addressing the merits of the case.

Since *Agins*, the Court has failed to reach the merits in four other facial challenges that could have been decided by applying the *Agins* analysis.[28] The ripeness problem looms as the most obvious cause of the *Agins* test's downfall.[29]

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23. *Agins*, 447 U.S. at 261-62.

24. *Id.*

25. *Id.* at 262-63.

26. *Id.*

27. *Id.*

28. Pennell v. City of San Jose, 485 U.S. 1 (1988) (Court held appellants' claim was not ripe because no actual person had been hurt by the government action as no hearing officer had relied on the challenged provision to reduce a rent below what it would have been as a result of other factors); MacDonald, Sommer, & Frates v. Yolo County, 477 U.S. 340 (1986) (landowner's claim was not yet ripe because there was no final determination by the County Planning Commission on how it will apply the zoning regulations at issue); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (appellants' claim was not ripe because the local planning commission had not yet made a final determination of the requested use); San Diego Gas and Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (claim was unripe because the local planning commission was still reviewing appellants' proposed use).

29. For a general review of the ripeness problem in regulatory takings cases, see Comment, *A New Approach to Regulatory Taking Analysis*, 1 B.Y.U. J. PUB. L. 399 (1987). For an excellent discussion of the ripeness problem in the context of California environmental and land use law, see 3 K. MANASTER & D. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, ch. 68 (1989).

The ripeness doctrine dictates that a regulatory takings claim is not ready for a judgment on the merits either because the landowner has yet to exhaust available administrative remedies[30] or has failed to present an actual person or entity specifically affected by the challenged regulation.[31] The Court's rationale for insisting on ripeness is based upon article III of the United States Constitution, which permits the judicial branch to render judgments only in actual controversies.[32]

The Supreme Court's recent decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[33] and *Nollan v. California Coastal Commission*[34] have contributed to the proliferation of the ripeness doctrine. Since the Supreme Court ruled that governmental actions in both cases constituted unlawful takings, the Court has signaled that it will no longer unconditionally uphold government discretion in formulating land use policy.[35] Thus, counsel representing regulatory bodies argue that the landowner's claims are unripe since municipalities and state governmental agencies do not want to test the scope and breadth of the *First English* and *Nollan* decisions.[36]

Before *First English* and *Nollan*, the Court tended to raise the ripeness argument unilaterally, which constitutes the usual procedure concerning issues of justiciability. In such situations, the Court would rule the case at hand unripe for final judgment when administrative remedies remained available to the landowner.[37] For example, on certain occasions, the Court would evade the takings issue because of a lack of ripeness, but still rule on the merits of other constitutional

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30. *E.g., MacDonald*, 477 U.S. 340 (1986); *Williamson County*, 473 U.S. 172 (1985); *San Diego Gas*, 450 U.S. 621 (1981); *Agins*, 447 U.S. 255 (1980).

31. *E.g., Pennell*, 485 U.S. 1 (1988); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).

32. U.S. CONST. art. III, § 2. *See also supra* note 29.

33. 482 U.S. 304 (1987) (Court found that Los Angeles County owed compensation to church for temporary taking of land used by the county for flood control).

34. 483 U.S. 825 (1987) (Court rejected California Coastal Commission's request for a lateral access easement from owners of beachfront property).

35. Prior to *First English* and *Nollan*, the last time the Supreme Court ruled that a regulatory action effected a taking was in Pennsylvania Coal Co v. Mahon, 260 U.S. 393 (1922).

36. *See* cases cited *supra* note 31.

37. *See, e.g.*, cases cited *supra* note 30.

challenges.[38] On other occasions, even though the case presented multiple constitutional challenges, the Court would nonetheless forego a ripeness analysis and address the merits of the alleged takings challenge.[39]

In any event, further analysis of facial challenges decided both before and after *First English* and *Nollan* shows that the Court's exercise of the ripeness doctrine in this area of law has resulted in a vague and nebulous standard from which little guidance can be gleaned. This conclusion will be supported by analyzing *Hodel v. Virginia Surface Mining and Reclamation Association*[40] (decided before *First English* and *Nollan*), *Keystone Bituminous Coal Association v. DeBenedictis*,[41] and *Pennell v. City of San Jose*[42] (the latter two cases were decided after *First English* and *Nollan*).

1. *Hodel v. Virginia Surface Mining*

The case of *Hodel v. Virginia Surface Mining and Reclamation Association*[43] serves as a proper starting point for analyzing the Supreme Court's use of the ripeness doctrine in facial challenges of regulatory takings. In *Hodel*, an association of coal producers, four individual landowners, the Commonwealth of Virginia, and the Town of Wise, Virginia brought a pre-enforcement challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977.[44] The legislation established a two-stage program, which includes an interim phase and a permanent phase, whereby each state would have the opportunity to formulate a plan to fulfill federally-mandated standards for mining activities.

Under the Act, the Secretary of the Interior inherited responsibility for enforcing the interim regulatory program and creating performance standards under which individual

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38. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988) (other constitutional issues concerned due process and equal protection); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (other constitutional issues concerned due process, the Commerce Clause, and states' rights).

39. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (the other constitutional issue concerned the Contracts Clause).

40. 452 U.S. 264 (1981).

41. 480 U.S. 470 (1987).

42. 485 U.S. 1 (1988).

43. 452 U.S. 264 (1981).

44. 30 U.S.C. § 1201 (1982). The Act was designed to protect both society and the environment from the adverse effects of surface coal mining operations.

states could develop their own programs. However, if a state chooses, it may adopt a federally administered plan designed for that particular state.[45] In *Hodel*, the plaintiffs' suit specifically challenged the sections of the Act which established the interim regulatory program.[46]

After a thirteen day trial in *Virginia Surface Mining and Reclamation Association v. Andrus*,[47] the United States District Court held that two of the Act's provisions violated the just compensation clause of the fifth amendment.[48] The Secretary of the Interior, Hodel, appealed directly to the nation's highest court.[49]

In an opinion written by Justice Marshall,[50] the Supreme Court found that enactment of the Act did not create a taking without just compensation. But, the *Hodel* Court failed to reach the merits of the case because neither the parties nor the lower court identified any specific property unconstitutionally taken by the operation of the statute.[51] Justice Marshall ruled that "the constitutionality of statutes ought not be decided except in an actual factual setting that

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45. *Id.* Virginia chose to develop its own plan to combat the effects of strip mining. The state's effort was partially approved and partially disapproved by the Secretary of Interior. *Hodel*, 452 U.S. at 272, n.7.

46. *Hodel*, 452 U.S. at 272; Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 501-503 (1987) [hereinafter Surface Mining Act]. Both the district court and the Supreme Court ruled on multiple constitutional challenges. Only the takings/just compensation clause analysis is relevant here.

47. 483 F. Supp. 425 (W.D. Va. 1980).

48. 30 U.S.C. § 1265(d)(4) (1982). First, the district court held that section 575 of the Act constituted an uncompensated taking by requiring individual landowners to restore "steep slope" surface mines to their approximate original contour. The court reasoned that this requirement would be economically and physically impossible. In the same line of argument, the court offered that, even if the steep slopes were restored to their approximate original contour after mining, the value of the land would be "practically nothing." *Virginia Surface Mining*, 483 F. Supp. at 437.

Second, the district court found that section 522, which prohibited mining in certain locations, effected a taking since the Act prohibited a private landowner from mining his own property. *Id.* at 441. The court based this finding on the Supreme Court's ruling in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), since the statute deprived coal mine owners of any use of their land. *Virginia Surface Mining*, 483 F. Supp. at 441.

49. *Hodel*, 452 U.S. at 272. This case was appealed directly from the federal district court in Virginia to the United States Supreme Court.

50. *Id.* (Marshall, J., was joined by Burger, C.J., Brennan, Stewart, White, Blackmun, Powell, and Stevens, J.J.) (Burger, C.J., Powell and Rehnquist, J.J., concurring).

51. *Id.* at 294.

makes such a decision necessary."[52] The Court further reasoned that without specific facts of an alleged taking, the ad hoc, multiple factor balancing test[53] used by the Court to determine applied violations of the takings clause, could not be administered.[54]

Since reaching a decision on the merits proved impossible, the Court applied the *Agins* test to determine if the mere enactment of the Act effected a taking.[55] Examining whether the statute denied a landowner the economically viable use of his land, the Court ruled that the Act did not prevent beneficial use of coal-bearing lands.[56] Marshall further ruled that the Act merely regulated the conditions under which miners could conduct their operations and did not purport to dictate alternative uses for coal-bearing lands.[57]

The final portion of the Court's takings discussion related to the consequences of an unripe claim. The Court found that the appellees (the Association) had not yet sought relief through the administrative process explicitly created by the Act.[58] Since the Association ignored possible administrative remedies, the Court concluded that appellees' claim had not achieved sufficient ripeness to obtain final judicial resolution.

Justice Powell's concurring opinion[59] largely echoed Marshall's decision. Justice Powell reinforced the Court's opinion with reasoning based on Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[60] In *San Diego Gas*, Brennan asserted that any taking of private prop-

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52. *Id.* at 294-95.

53. For applications of this test, *see, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

54. *Hodel*, 452 U.S. at 294.

55. *Id.* at 296.

56. *Id.* Justice Marshall acknowledged that section 522 of the Act prohibited mining on certain types of land, but also ruled that any challenge of this provision would be premature since: 1) none of appellees' land was affected by section 522; 2) section 522 does not prohibit non-mining uses of affected land; and 3) as enacted, section 522 was made expressly subject to existing mining rights. *Hodel*, 452 U.S. at 296 n.37.

57. *Hodel*, 452 U.S. at 296.

58. Upon a proper request, section 515(c) (30 U.S.C. § 1265(c) (1976 & Supp. II 1978)) allows for a variance from the approximate original contour requirement of the Act. Further, section 522(c) (30 U.S.C. §1272(c) (1976 & Supp. II 1978)) provides for a waiver from surface mining restrictions on specific types of environmentally sensitive land. 30 U.S.C. §§ 515, 522 (1987 & Supp. II (1978)).

59. *Hodel*, 452 U.S. at 305 (Powell, J., concurring).

60. 450 U.S. 621 (1981).

erty for public use deserves compensation.[61] In the *Hodel* facial challenge,[62] which was based on due process grounds, the appellees failed to allege that the Act appropriated any specific land for public use. Thus, Powell cited Brennan's *San Diego Gas* dissent to solidify the point that appellees may litigate the actual takings issue in the future if a specific landowner alleges that his property was taken by the enforcement of the Act.[63]

2. *Keystone Bituminous Coal Association v. DeBenedictis*

Like *Hodel*, *Keystone Bituminous Coal Association. v. DeBenedictis*[64] presented a facial challenge to an alleged regulatory taking. In *Keystone*, the appellants, an association whose members owned, leased, or controlled large coal reserves in western Pennsylvania, challenged a Pennsylvania statute[65] that sought to resolve problems of land subsidence caused by underground coal mining. Specifically, section 4 of the Subsidence Act prohibited coal mining that resulted in subsidence damage to preexisting public buildings, dwellings, and cemeteries. The legislature required fifty percent of the mineable coal to remain underground in order to provide surface support.[66] Section 6 of the statute contained a provision requiring coal companies to repair subsidence damage or pay damages to those who suffer such injury.[67] The Association filed suit in federal district court claiming that enforcement of the statute constituted an uncompensated taking according to the fifth amendment.[68]

The district court granted appellees' motion for summary judgment since the appellants had neither alleged nor proved any specific injury caused by the statute's enactment.[69] The trial court also ruled that the Act served valid

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61. *Id.* at 654 (Brennan, J., dissenting).

62. *Hodel*, 452 U.S. at 266.

63. *Id.* at 306 (Powell, J., concurring).

64. 480 U.S. 470 (1987).

65. Bituminous Mine Subsidence and Land Conservation Act, PA. STAT. ANN. tit. 52 §§ 1406.1-1478 (Purdon Supp. 1986).

66. *Id.* § 1406.4.

67. *Id.* § 1406.6.

68. Another part of the complaint alleged a Contracts Clause claim which will not be discussed here.

69. Keystone Bituminous Coal Ass'n v. DeBenedictis, 581 F. Supp. 511, 513 (W.D. Penn. 1984).

public safety purposes.[70] Further, the court responded to appellants' claim that the statute destroyed their interest in the support estate[71] by ruling that the support estate consisted of a bundle of rights, many of which remained unaffected by the statute.[72]

On appeal, the third circuit affirmed the district court's decision, but the appellate court's analysis regarding the support estate differed somewhat from the rationale of the court below.[73] The Association then appealed to the Supreme Court.

In an opinion written by Justice Stevens, the Supreme Court ruled that the enactment of the Subsidence Act did not comprise a taking.[74] Ignoring the increasingly popular trend of finding appellants' facial regulatory takings claims unripe,[75] the Court decided *Keystone* on its merits.

First, Justice Stevens distinguished the present case from *Pennsylvania Coal* by showing that the two factors considered by the Court in *Pennsylvania Coal*, the state's interest in enacting the statute and the extent of the alleged taking, supported the present statute's constitutionality.[76] The majority then found that the Pennsylvania legislature passed the Subsidence Act as a response to a perceived threat to public

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70. *Id.* However, such valid public safety purposes were not found by the Supreme Court in a very similar suit decided over 60 years prior to Keystone. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the granddaddy of the modern takings case, Justice Holmes formulated his famous edict; if a regulation goes too far, it will be considered a taking. *Id.* at 415.

71. Pennsylvania follows a unique method of classifying property interests. A party can own any combination of three estates in land: the surface estate (surface land only), the support estate (the land preventing the surface estate from subsiding), and the mineral estate (the natural resources beneath the land). *Id.* at 518-19 (citing Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 TEMP. L.Q. 1 (1951)).

72. *Keystone*, 581 F. Supp. at 518-19.

73. Keystone Bituminous Coal Ass'n. v. Duncan, 771 F.2d 707 (3d Cir. 1985), *aff'g*, Keyston Bituminous Coal Ass'n v. DeBenedictis, 581 F. Supp. 511 (W.D. Penn. 1984). While upholding the statute as a reasonable government action, the court of appeals considered the support estate as just one component of a larger bundle of rights that included either the surface estate or mineral estate, both of which were already owned by the coal companies. *Keystone*, 771 F.2d at 718-19. Thus, the appellate court ruled that the Act did not destroy the landowners' bundle of property rights.

74. *Keystone*, 480 U.S. 470 (1987).

75. *See supra* notes 28-32.

76. *Keystone*, 480 U.S. at 484-85.

health and welfare.[77] Further, contrary to the Kohler Act litigated in *Pennsylvania Coal*, the present statute served to benefit the entire public, not only private concerns.[78]

Second, the *Keystone* Court rigorously applied the *Agins* test[79] to the facts. Regarding the valid public purpose requirement, the Court noted that the statute's explicit legislative intent[80] served a valid and rational public purpose. The majority also found that the statute's broad language deters mine operators from causing any subsidence damage, and thus, relieved coal companies from paying Section 6 damages.[81]

After a summary of the Court's rulings in early takings decisions,[82] Justice Stevens rationalized the Court's reticence in finding regulatory takings by stating that one of the government's primary ways of preserving the public "weal"[83] is limiting the uses individuals can make of their property.[84] Although restrictions constitute a slight burden to landowners, Justice Stevens noted, the general public benefits greatly from such limitations.[85] In short, the Court ruled that the statute fulfilled a valid public purpose.

The decision also applied the second part of the *Agins* test,[86] namely, that government action creates a taking if it denies a landowner of economically viable use of his land.[87] The Court held that appellants had not shown any economic deprivation substantial enough to prove a regulatory taking.[88] Furthermore, the Act did not prevent appellants from

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77. *Id.*

78. *Id.* Some theorists assert that Justice Stevens' majority opinion in *Keystone* adopted its reasoning from Justice Brandeis' dissent in *Pennsylvania Coal.* For an example of this viewpoint, see Callies, *Takings Clause-Take Three*, A.B.A. J. 54 (Nov. 1, 1987).

79. *Keystone*, 480 U.S. at 485-97. *See also* U.S. CONST. amend. V, X.

80. *Keystone*, 480 U.S. at 485. The legislative intent of the Act includes: conservation of surface land, protection of public safety, enhancement of affected lands' value, preservation of surface water drainage and public water supplies, and general improvement of use and enjoyment of affected lands. PA. STAT. ANN. tit. 52, § 1406.2 (Purdon Supp. 1986).

81. *Keystone*, 480 U.S. at 485; PA. STAT. ANN. tit. 52, § 1406.2.

82. *Keystone*, 480 U.S. at 490.

83. *Id.* at 491.

84. *Id.*

85. *Id.*

86. *See supra* notes 22-27 and accompanying text for discussion of *Agins* test.

87. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

88. *Keystone*, 480 U.S. at 493.

profitably engaging in their business, nor did it interfere with their investment backed expectations.[89] The majority reasoned that the Act allowed coal companies reasonable profit from mining the area's natural resources because appellants failed to specify a single mine which could no longer earn a profit due to the enactment of the statute.[90]

In comparing the value taken by the statute with the remaining value in the property, the *Keystone* Court held that the legislation allowed landowners to retain sufficient value in their land so as not to effect a taking.[91] Finally, the Court concluded the economic use analysis by rejecting appellants' contention that the Act completely destroyed the value of their support estate. Here, the Supreme Court supported the Third Circuit's finding that the support estate only has value because it "protects or enhances"[92] the value of the associated estates—the surface and/or mineral estates. Thus, since appellants hold the right to utilize the mineral estate, the statute's burden on the support estate does not create a taking.[93]

In his dissent,[94] Chief Justice Rehnquist contended that the Subsidence Act worked a taking of appellants' property interests. Rehnquist rejected the majority's assertion that the *Pennsylvania Coal* decision is "advisory."[95] He believed the differences between *Keystone* and *Pennsylvania Coal* "verge on the trivial"[96] since, like the Subsidence Act, the Kohler Act's public purpose was to protect the public from subsidence problems.

Rehnquist also disagreed with the majority's decision that regulations designed to prevent public nuisances contain enough of a public purpose, in and of themselves, to be con-

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89. *Id.* at 496. An example of an investment-backed expectation is the belief held by a landowner that he will earn profit as the result of developing or conveying his property.

90. *Id.*

91. The Court acknowledged that the Act forced appellants to leave approximately twenty-seven million tons of coal in the ground. *Id.* at 498. However, even without the statute in effect, the majority noted that mining efforts can only profitably extract seventy-five percent of the coal from any mine in the region. *Id.*

92. *Keystone*, 480 U.S. at 501.

93. *Id.*

94. *Id.* (Powell, O'Connor, and Scalia, J.J., dissenting).

95. *Id.* at 484.

96. *Id.* at 509 (Rehnquist, C.J., dissenting).

sidered valid.[97] The Chief Justice stated that the legitimacy of this "nuisance exception" presented a question of federal law, subject to independent scrutiny by the Court.[98] Although the majority recognized Rehnquist's argument, the Court held that, if for no other reason, the Act was valid since it fell within the "public nuisance" exception.[99]

Moreover, Rehnquist stated that the statute effected a taking based on the viable economic use prong of the *Agins* test. He concluded that the twenty-seven million tons of coal which appellants were forced to leave unmined represented a significant amount of foregone revenue.[100] The Act caused a loss comparable to that which would be suffered had the government physically occupied the land.[101]

Finally, Rehnquist disagreed with the majority's reasoning that the value of the support estate constituted only a portion of the total sum value of the three estates. Instead, the Chief Justice asserted that the support estate had inherent value separate from that of the other estates.[102] Using the belief that the support estate contained real independent value, Rehnquist concluded that the Act effected a taking of appellants property without just compensation.

3. *Pennell v. City of San Jose*

The Supreme Court's most recent decision in a case presenting a facial challenge of an alleged regulatory taking came in *Pennell v. City of San Jose*.[103] In *Pennell*, San Jose's rent control ordinance withstood a takings, due process, and equal protection challenge brought by a private apartment building owner and a local association of apartment house owners.[104]

In 1979, San Jose's City Council enacted section 5703.28 of its city ordinance, the Rent Dispute Mediation and Arbitration Ordinance.[105] The stated legislative intent of the or-

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97. *Id.* at 486.
98. *Id.* at 512 (Rehnquist, C.J., dissenting).
99. *Id.* at 486.
100. *Id.* at 515-16 (Rehnquist, C.J., dissenting).
101. *Id.* at 516 (Rehnquist, C.J., dissenting).
102. *Id.* at 519-20 (Rehnquist, C.J., dissenting).
103. 485 U.S. 1 (1988).
104. This analysis shall focus only on the takings claim.
105. SAN JOSE, CAL., RENT DISPUTE MEDIATION AND ARB. ORDINANCE CODE §

dinance consisted of the following:

> to alleviate some of the more immediate needs created by San Jose's housing situation. These needs include, but are not limited to, the prevention of excessive and unreasonable rent increases, the alleviation of undue hardships upon individual tenants, and the assurance to landlords of a fair and reasonable return on the value of their property.[106]

The city reasoned that uncontrolled rent increases created housing instability by forcing constant relocation of tenants, resulting in a class of transient apartment dwellers. This displacement of residents adversely affected the community in general since some tenants were unable to find suitable housing at affordable rates.[107]

The ordinance sought to put the legislative intent into action by allowing the landlord of a regulated unit to raise the rent of a tenant in possession by a maximum of eight percent per year.[108] With tenant consent, a landlord could raise rents by more than eight percent.[109] However, without tenant consent, a landlord wishing to raise rents by more than eight percent must pursue an administrative process in which a hearing officer would determine whether the additional rent increase was reasonable under the circumstances.[110]

As stated, the ordinance granted certain increases above

17.23.440 (1979) (codified city ordinance no. 19,696 § 5703.28). This comment shall follow the Supreme Court's lead in using the Ordinance's originally designated code section numbers.

106. *Id.* § 17.23.020 (codified city ordinance no. 19,606 § 55703.2).

107. *See* Brief of Appellee at 6, Pennell v. City of San Jose, 485 U.S. 1 (1988) (No. 86-753).

108. SAN JOSE, CAL., RENT DISPUTE MEDIATION AND ARB. ORDINANCE CODE § 17.23.180 (1979) (codified city ordinance no. 19,696 § 5703.2). In comparison, Los Angeles, California allows a 7 percent increase without review. Santa Monica, California allows a 4 percent increase without review while New York City grants landlord a 3 percent automatic increase.

109. The full amount of the noticed rent increase would go into effect for all tenants, not including those tenants who file a timely petition for a hearing. *See id.* § 17.23.210, .360 (codified city ordinance § 5703.12,.27).

110. *Id.* § 17.23.440 (codified city ordinance no. 19,696 § 5703.28). The hearing officer must decide whether the additional increase is reasonable "taking into consideration that the purpose of this ordinance is to permit landlords a fair and reasonable return on the value of their property while protecting tenants from arbitrary, capricious or unreasonable rent increases, and under the circumstances, unjustified economic hardship." *Id.*

eight percent even without tenant consent. First, section 5703.28(a) deemed reasonable an increase of five percent plus the pass-through costs[111] for increases for capital improvements and required maintenance. Second, the ordinance automatically allowed rent increases for increased costs of landowner debt service.[112]

If a landlord sought rent increases greater than the five percent plus pass-through costs or increased debt service provisions, the ordinance dictated that the hearing officer may consider seven factors to determine the reasonableness of the proposed increase. Tenant hardship constituted the final factor that the hearing officer could take into account.[113]

Richard Pennell, an apartment building owner in San Jose,[114] filed suit in the Santa Clara County Superior Court just weeks after the city council passed San Jose's rent control law. He claimed the tenant hardship factor,[115] coupled

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111. *Id.* Pass through costs are assessments charged to tenants as soon as they are incurred by the landlord.

112. SAN JOSE, CAL. RENT DISPUTE MEDIATION AND ARB. ORDINANCE CODE § 17.23.440(b) (1979) (codified city ordinance no. 19696 § 5703.28(b)).

"Debt service" is the interest and charges currently payable on a debt, including principle payments. BLACK'S LAW DICTIONARY 365 (5th ed. 1979).

113. SAN JOSE, CAL. RENT DISPUTE MEDIATION AND ARB. ORDINANCE CODE §§ 17.23.440(c)(1)-17.23.440(c)(7) (1979) (codified City Ordinance no. 19,696 §§ 5703.28(c)(1)-5703.28(c)(7)). The first six factors are objective: the landlord's finance costs, rental history of the unit, physical condition of the unit, increases or reductions of housing services during the last 12 months before the effective date of the proposed increase, other financial information voluntarily provided by the landlord, and existing market value of rental rates for comparable units. The final factor is subjective: tenant hardship. *Id.* § 17.23.450 (codified city ordinance § 5703.29) defines tenant hardship. It reads:

> Any tenant whose household income and monthly housing expense meet[] the criteria established by the Housing Assistance Payments Program under Section 8, existing housing provisions of the Housing and Community Development Act of 1974 (Public Law [sic] 93-383) and the regulations pertaining thereto, shall be deemed to be suffering under financial and economic hardship which must be weighed in the hearing officer's determination.

Id. § 17.23.450 (codified city ordinance § 5703.29).

In more understandable terms, a family of four with a yearly income below approximately $31,000 per year qualifies under the hardship criterium.

114. At the time Pennell filed suit, he owned an apartment building in San Jose. While his claim was being appealed to the Supreme Court, he sold this piece of property. Shortly before the Court rendered its decision, however, he repurchased an apartment building.

115. SAN JOSE, CAL. RENT DISPUTE MEDIATION AND ARB. ORDINANCE CODE §

with the section describing how a hearing officer balances this subjective criterion with the six objective criteria, violated the due process[116] and equal protection[117] clauses of the United States Constitution.[118] The trial court entered judgment on the pleadings in favor of plaintiffs. The city appealed and the state court of appeals affirmed.[119]

The City of San Jose appealed once again.[120] By a divided vote, the California Supreme Court reversed the court of appeal's decision and upheld the city's rent control ordinance as a constitutional exercise of police power.[121] Pennell then utilized the final possible avenue of judicial review.

The United States Supreme Court granted Pennell's subsequent appeal on a writ of certiorari. Chief Justice Rehnquist delivered the Court's majority opinion upholding the ordinance,[122] while Justice Scalia wrote the dissent.[123]

After ruling that appellants had standing to sue,[124] the

17.23.440(C)(7) (1979) (codified City Ordinance no. 19,696 § 5703.28(c)(7)).

116. U.S. CONST. amend. XIV § 1.

117. *Id.*

118. Pennell v. City of San Jose, 154 Cal. App. 3d 365, 366, 201 Cal. Rptr. 728, 729 (1984). Pennell's original complaint did not allege that the ordinance effected a regulatory taking. In June 1987, the complaint was amended following the United States Supreme Court's ruling in Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (Court held that the commission's request for a lateral access easement in exchange for a building permit constituted a taking).

119. *Pennell*, 154 Cal. App. 3d at 366, 201 Cal. Rptr. at 730 (The appeals court also validated an annual rental fee imposed by the city on each rental unit. The validity of this fee was not litigated before the U.S. Supreme Court).

120. *Id.* at 365, 201 Cal. Rptr. at 726.

121. *Id.* In contrast, the dissenters in the California Supreme Court found the ordinance to comprise "a forced subsidy imposed on the landlord." *Id.* at 377, 201 Cal. Rptr. at 734.

122. Pennell v. City of San Jose, 485 U.S. 1 (1986) (Renquist, C.J., Brennan, White, Marshall, Blackmun, Stevens, J.J.).

123. *Id.* at 15 (Scalia, O'Connor, J.J., concurring in part, dissenting in part) (Kennedy, J., did not participate in the decision).

124. The city argued that appellants lacked standing both as an individual and as an association. For the current state of the law regarding individual standing, see Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (individual standing requires an actual injury redressable by the Court). Concerning standing as a group or association, see Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (an association has standing on behalf of its members only when its members would otherwise have standing to sue on their own).

Although the Court conceded that neither appellant had any tenant who qualified under the hardship provision, Justice Rehnquist held that appellants

majority focused on Pennell's allegation that the tenant hardship provision effected a taking of property without just compensation. On this point, the appellants contended that the consideration of tenant hardship would reduce the allowable rental rate to an amount below the price established by the six objective factors.[125] Thus, the appellants further alleged that the amount of the taking would equal the rate created by consideration of the six objective factors less the allowable rate established by weighing and balancing all seven factors.

The Court responded that appellants' takings claim was premature due to the limited factual record before the Court. The Chief Justice held that since a hearing officer had never relied upon the tenant hardship factor to adjust a rental rate, the exact consequences of such an action could not be predicted.[126] Moreover, nothing in the ordinance required a hearing officer to reduce a rental rate on grounds of tenant hardship.[127] Since the merits of alleged regulatory takings demand analysis under an ad hoc, multi-factored approach,[128] the Court stated that the present parties produced insufficient facts for the Court to rule on their takings claim.[129]

The *Pennell* majority analogized the "unripe" status of this litigation to that of *Hodel*[130] where the landowner failed to identify specific property allegedly taken by the governmental action. Similarly, in *Pennell*, the Court found that it could not rule upon a claim on the merits without a specific, concrete allegation of a setting in which a rental rate was lowered by the ordinance's provisions.[131]

The Supreme Court next considered appellants' due

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owned property subject to the provisions of the ordinance and that appellants also represented landlords who might have hardship tenants in their buildings. *Pennell*, 485 U.S. at 9.

125. *Id.*

126. *Id.*

127. *Id.* According to section 17.23.440 (codified City Ordinance § 5703.28) of the Ordinance, the hearing officer may order that the proposed increase beyond eight percent be disallowed based on consideration of all seven factors.

128. *See, e.g.*, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

129. *Pennell*, 485 U.S. at 10.

130. *Id.* (citing Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 294 (1981)).

131. *Pennell*, 485 U.S. at 10.

process and equal protection claims.[132] With respect to the due process contention, the majority stated that the mere possibility of a hearing officer considering tenant hardship in determining a fair rental rate did not invalidate the city's ordinance on due process grounds. The Court found the ordinance analogous to other forms of acceptable price control measures since San Jose's regulation was not "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt."[133] Lastly, Rehnquist concluded that appellants' equal protection claim failed because the ordinance was rationally related to the legislative purpose of providing affordable housing.[134]

Justice Scalia's dissent agreed with the majority that the ordinance survived constitutional scrutiny on due process and equal protection grounds. However, in contrast to the majority's decision, the Associate Justice found the rent control ordinance perfectly ripe for a facial takings analysis. In fact, Justice Scalia believed that the ordinance effected a taking of appellants' property.[135]

First, Scalia asserted that the majority would not offer their lack of ripeness argument if, for example, the city's ordinance called for the hearing officer to consider the tenant's race in fixing the rental amount.[136] According to Scalia, appellants' takings claim was as ripe and mature as their due process and equal protection claims, which were decided by the majority.

The dissent also claimed that the majority confused physical takings with regulatory takings in their conclusion that Pennell's claim was "premature."[137] Scalia believed that the

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132. *Id.* at 11. Since this comment focuses on property takings, the Court's ratification of the San Jose ordinance on due process and equal protection grounds will be afforded only cursory examination.

133. Permian Basin Area Rate Cases, 390 U.S. 747, 769-70 (1968) (quoting Nebbia v. New York, 291 U.S. 502 (1934)).

134. For a superb overview of the differing degrees of the Supreme Court's rationality review, see Galloway, *Means-End Scrutiny in American Constitutional Law*, 21 LOY. L.A.L. REV. 449 (1988).

135. *Pennell*, 485 U.S. at 15 (Scalia, J., dissenting). For an alternative critique of this dissent, see *Kmiec*, *supra* note 8, at 1652-54 (author analyzes whether the hardship provision of the San Jose Ordinance sought to extract a benefit from the landlords).

136. *Pennell*, 485 U.S. at 16 (Scalia, J., dissenting).

137. *Id.* Scalia's exact language follows:

The Court confuses the issue by relying on cases, and portions of cas-

San Jose ordinance effected a physical invasion of the landlord's property,[138] and, thus, deserved more than a facial analysis.[139] In an attempt to show that the majority should have addressed *Pennell*'s merits, Scalia discussed the similarities between the instant case and both *Keystone* and *Hodel*.[140] In *Keystone*, Scalia noted that the Court accepted a facial challenge of an alleged regulatory taking and proceeded to decide the case on the merits, without a hint of any "unripeness" or "prematurity."[141] With respect to *Hodel*, Scalia contended that although the *Pennell* majority categorized *Hodel* as a facial challenge, the Supreme Court's decision dealt with the "taking issue decided by the District Court."[142] The dissent believed that the *Hodel* trial court adjudicated the case "as applied," not as a facial challenge. Thus, Scalia felt the Court's *Pennell* decision made the same mistake as the Court's *Hodel* holding since both majority opinions limited their analyses to facial—and therefore unripe—challenges.[143]

In a continued attempt to show that appellants' takings claim was ripe, Scalia viewed San Jose's ordinance under the *Agins* test as a government action which fails to advance legitimate state interests.[144] He argued that if the ordinance were viewed as such, knowing the exact economic background of a particular tenant or the physical characteristics of a particular apartment building would not change the analysis. According to Scalia, the specific facts would be irrelevant in this case because a physical invasion of property occurred.[145] Nonetheless, Scalia still believed the ordinance

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> es, in which the Takings Clause challenge was not (as here) that the law in all its applications took property without just compensation, but was rather that the law's application in regulating the use of particular property so severely reduced the value of that property as to constitute a taking.

Id.

138. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), any physical invasion caused by a governmental action constitutes a taking).

139. *Id. See* Berger, *supra* note 14 for a definition of a physical takings claim.

140. *Pennell*, 485 U.S. at 16.

141. *Id.* at 16-17.

142. *Id.* at 18 (quoting *Hodel*, 452 U.S. at 297 (1981)).

143. *Id.*

144. *See supra* notes 20-27 and accompanying text for the *Agins* test for facial takings challenges.

145. *Pennell*, 485 U.S. at 19. Remember, Justice Scalia equates the San Jose

would fail under the *Agins* test because of the tenant hardship factor.[146]

III. ANALYSIS

Careful examination of the United States Supreme Court rulings in *Agins*,[147] *Hodel*,[148] *Keystone*,[149] and *Pennell*[150] frames the major problem concerning facial regulatory takings challenges. The Court's arbitrary use of the ripeness doctrine prevents complete adjudication of important cases in this area of the law. Incomplete adjudication leaves affected property owners and lessees unsure of the extent of their property rights—even after their claims have been heard by the United States Supreme Court. Regulatory bodies find themselves in a similarly tenuous position because the scope of their police powers remain ill-defined. In short, both public and private interests suffer from such a confused state of the law.[151]

Basic tenets of real property law protect landowners from unreasonable restraints on alienation,[152] use, and development of their property. In short, use and development of property is subject to valid public regulation.[153] The Su-

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Ordinance with a physical invasion, such as found in Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419 (1982).

146. The dissent distinguished the San Jose ordinance from a constitutional rent control statute on the basis of the hardship provision. Scalia stated that the provision, by lowering rental revenue, forced landlords to suffer for problems beyond their control the economic situation of the tenant. *Pennell*, 485 U.S. at 21. Scalia then asserted that federal, state, or local programs should assist the underprivileged instead of those landlords unfortunate enough to house poor tenants. *Id.* In sum, the dissent argued that the ordinance's tenant hardship provision effects a taking by forcing a public burden on a private party.

147. *See supra* notes 20-29 and accompanying text for a discussion of the *Agins* case.

148. *See supra* notes 43-63 and accompanying text for a discussion of the *Hodel* case.

149. *See supra* notes 64-102 and accompanying text for a discussion of the *Keystone* case.

150. *See supra* notes 103-46 and accompanying text for a discussion of the *Pennell* case.

151. *See generally* Berger, *supra* note 8, at 781 n.241.

152. Alienability is the right of a landowner to control the terms, such as time and price, of any conveyance of his land. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 112-21 (1985). Property owners remain subject to the reciprocal rights of their neighboring landowners, such as nuisance law principles. *Id.*

153. However, California courts have held that property development is a privi-

preme Court effectively thwarts these rights of property ownership through its inconsistent treatment of facial regulatory takings challenges. Free alienability is hindered since no intelligent property buyer would pay full value for land burdened by pending, or inconclusive, litigation.[154] Similarly, an owner's development rights suffer from a court's conclusion that a regulatory takings claim is unripe because the extent of allowable development remains unknown even after expensive litigation.

By their very nature, facial regulatory takings claims are particularly fact specific, which makes a uniform formula for deciding every such case nearly impossible.[155] However, increased judicial consistency would help both property owners and regulatory bodies. Analysis of judicial inconsistencies and ambiguous applications of established rules, as evident in *Agins*,[156] *Hodel*,[157] *Keystone*,[158] and *Pennell*[159] gives rise to a proposal which offers specific criteria for courts to use in determining the ripeness of a facial regulatory takings challenge.

In *Agins*, as stated previously,[160] the Supreme Court failed to reach the case's merits because the appellant had not applied to the city for a specific use of his land.[161]

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lege, not a right. Trent-Meredith v. City of Oxnard, 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685, 691 (1981).

154. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1216-17 (1967); Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988).

155. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390, 397 (1926) (Court held that regulatory takings cases, including constitutional challenges of zoning ordinances, must be analyzed on a case by case basis—making the application of a uniform formula impossible).

156. *See supra* notes 20-29 and accompanying text for a discussion of the *Agins* case.

157. *See supra* notes 43-63 and accompanying text for a discussion of the *Hodel* case.

158. *See supra* notes 64-102 and accompanying text for a discussion of the *Keystone* case.

159. *See supra* notes 103-16 and accompanying text for a discussion of the *Pennell* case.

160. *See supra* notes 20-27 and accompanying text.

161. In the land use planning arena, the Court has also invoked other ripeness requirements. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 347 (1986) (property owner must apply not only for the maximum permitted use under existing regulations, but also for less expansive permitted uses); Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172,

Nonetheless, the Court proceeded to decide whether the mere enactment of the land use regulation effected a taking. In the following year, the Court failed to examine the merits of *Hodel* because neither the property owners nor the trial court identified any specific land appropriated for public use.[162] As in *Agins*, the landowner's claim that the regulation itself constituted a taking was ruled ripe for adjudication.[163] Further, *Hodel* was decided by application of the test originally formulated in *Agins*.[164]

In *Keystone*, the facts presented a similar facial regulatory takings challenge, but the Supreme Court failed to invoke the ripeness doctrine in its decision.[165] Instead, the Court limited its ruling to a thorough application of the *Agins* test.[166] Adding to the confusion, the Court's latest opinion in this area of the law, *Pennell*, ruled appellants' claim unripe.[167] The situation in *Pennell* resembled *Agins* and *Hodel*, but the Court did not engage in a facial takings analysis, as had been the case in the three earlier Supreme Court cases.[168]

Consequently, two related questions arise from the summary of facts presented above. First, in light of *Agins*, *Hodel*, and *Keystone* (where the Court applied the appropriate facial regulatory takings test), why did the *Pennell* court fail to apply the *Agins* test?[169] Second, in light of the Court's use of the ripeness doctrine in *Agins* and *Hodel*,[170] why did the *Keystone* court fail to invoke the same ripeness doctrine? Consequently, the core of the facial regulatory takings problem

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187-88 (1985) (landowner must apply for a variance and must attain a final determination of uses permitted by the local agency).

162. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 294 (1981).

163. *Id.*

164. *Id. See supra note* 58.

165. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1989).

166. *Id.*

167. Pennell v. City of San Jose, 154 Cal. App. 3d 365, 201 Cal. Rptr. 728 (1988).

168. *Id.*

169. The *Pennell* Court's application of the ripeness doctrine should not have affected whether the mere enactment of the ordinance effected a taking. In both *Hodel* and *Agins*, the Court found the litigated claim unripe, but still ruled upon whether the mere enactment of the questioned regulations constituted takings.

170. *Pennell* is analogous, but cannot stand as authority here because it was decided after *Keystone*.

lies in inconsistent application of the *Agins/Hodel* precedent in the two latest cases, *Keystone* and *Pennell.*

Addressing the first question, the *Pennell* majority's failure to apply the *Agins* test in light of clear precedent to the contrary seems incomprehensible. Explanation by the Court in future decisions would be useful as the facts and procedural context of *Pennell* dictate that the Court should have applied the *Agins* facial challenge test.

The Supreme Court developed the *Agins* test to determine whether the enactment of a regulation constituted a taking.[171] In *Agins* and *Hodel,* the Court applied this test to the facial challenge, and then invoked the ripeness doctrine.[172] In these earlier cases, the lack of ripeness prevented an "as applied" analysis since the parties failed to allege any specific property was taken. In *Pennell,* the Court used similar reasoning in finding the challenge unripe, but failed to follow precedent by not applying the *Agins* test.[173] Even though *Pennell* presented the same type of challenge as the earlier cases, including *Keystone,* the majority ruled that the takings claim was "premature."[174]

Justice Scalia's dissent in *Pennell* urged that appellants' takings claim was in fact ripe for decision.[175] Specifically, Scalia offered that the *Agins* test should rule and the application of the test would reveal that the city's ordinance effected a taking since it does not advance a legitimate government purpose.[176] For the purposes of this comment, Scalia's conclusion that a taking occurred is less important than the fact that he cut through the procedural obstacles and utilized the proper tool for deciding facial challenges of

171. Agins v. City of Tiburon, 447 U.S. 255, 263 (1981). *See also supra notes* 20-27 and accompanying text.

172. *See supra* notes 11, 20-27, 50-58 and accompanying text.

173. *Pennell,* 485 U.S. 1 (1988). *See supra* notes 126-31 and accompanying text.

174. *See supra* notes 126-31 and accompanying text.

175. *See supra* notes 20-27, 136-44 and accompanying text.

176. *Pennell,* 485 U.S. at 18. (Scalia, J., dissenting). The author disagrees with Justice Scalia on this point. Rent control, including San Jose's ordinance, advances the legitimate state interest of striving to provide affordable housing for the less advantaged classes of society. Further, the San Jose ordinance does not deny an owner of economically viable use of his land since the ordinance ensures a fair profit from rental housing. For a reinforcement of this point of view, see Motion of Appellees to Dismiss or Affirm at 7-9, Pennell v. City of San Jose, 485 U.S. 1 (1988) (No. 86-753).

regulatory takings, the *Agins* test.

Perhaps the *Pennell* majority passed on appellants' takings claim because the Court felt it stood on firmer ground by upholding the city's ordinance on due process and equal protection grounds.[177] But, in both *Hodel* and *Keystone*, the Court ruled on the alleged takings claim in concert with other constitutional challenges.[178] Nevertheless, the question of why the *Pennell* court failed to rely upon the *Agins* test cannot be properly answered without further assistance from the Supreme Court itself.

A precise answer to the second question, concerning the lack of a ripeness analysis in *Keystone*, proves equally difficult. The answer could lie in *Keystone*'s similarity to the earlier case of *Pennsylvania Coal Co. v. Mahon*.[179] Although the issue in the latter case concerned an "as applied" challenge and was therefore decided on the merits, the facts of *Pennsylvania Coal* otherwise mirrored those presented sixty-six years later in *Keystone*.[180]

Even though *Keystone* involved a facial challenge,[181] the Court may have chosen to forego application of the ripeness doctrine because both *Keystone* and *Pennsylvania Coal* litigated the validity of Pennsylvania statutes that sought to prevent land subsidence caused by mining operations.[182] The cases share another factual similarity as well, since both appellants contended that a state statute unconstitutionally took property without just compensation. Thus, the *Keystone* court may have thought the interests of those involved would be more equitably served by rendering a judgment, even if opposite to that of analogous precedent,[183] than by invoking the ripe-

177. *See Pennell*, 485 U.S. at 11-15.

178. In *Hodel* (Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981)), the mining association also argued due process and states' rights claims. In *Keystone* (Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987)), the appellants also claimed that the statute violated the contracts clause of the United States Constitution.

179. 260 U.S. 393 (1922).

180. A few differences exist between the two cases. For example, in *Pennsylvania Coal*, the Act was passed to protect private interests who had released their right to subsidence protection. *Id. See* PA. STAT. ANN. TIT. 52, § 661 (Purdon 1966). In contrast, the statute litigated in *Keystone* (480 U.S. 470 (1987)) was enacted to protect the public from land subsidence.

181. *See supra* note 64 and accompanying text.

182. *See* Bituminous Mine Substance and Land Conservation Act, PA. STAT. ANN. TIT. 52, §§ 1406.1-1478 (Purdon Supp. 1986); *Id.* § 1406.4.

183. The United States Supreme Court came to opposite conclusions in *Penn-*

ness doctrine and not addressing the merits of the claim.

Alternative reasons may exist for the Court's decision to forego a ripeness analysis in *Keystone* even though the doctrine was applied in *Agins* and *Hodel*. However, *Keystone* deviates from established precedent[184] set by *Agins* and *Hodel*, since all three suits comprised pre-enforcement challenges of alleged property takings. Coupled with the *Pennell* Court's failure to apply the established test for facial challenges, the inconsistency in the *Keystone* decision reveals that the present state of the law is unknown in the field of facial regulatory takings challenges.

Although the Supreme Court's overall discretion in applying the ripeness doctrine, and other rules concerning standing, should remain intact,[185] an obvious need exists for increased consistency and clarity in facial regulatory takings challenges. However, the Court's discretion should not be abused to the extent that random judicial fiat determines whether the Supreme Court shall decide on the merits a good faith claim grounded in the takings clause of the United States Constitution's fifth amendment. Therefore, the Court's discretion in these matters should be guided by specific criteria. These criteria would aid the Court in determining the ripeness of a facial challenge of a regulatory taking and, hopefully, allow for more uniform application of the *Agins* test.[186]

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sylvania Coal and *Keystone*. The Court ruled that the legislation effected a taking in *Pennsylvania Coal*. In contrast, the Court held that no taking arose in *Keystone*.

184. *See supra* note 161 for additional ripeness requirements.

185. For the current state of the law regarding the concept of standing, see *supra* note 124. *See also* Berger, *supra* note 8, at 788 n.273.

186. For examples of "as applied" (non-facial) regulatory takings challenges, see *supra* note 161.

IV. PROPOSAL

The preceding analysis shows that the Supreme Court has applied the ripeness doctrine to facial regulatory takings cases in a seemingly arbitrary, inconsistent manner.[187] The Court strictly applied the ripeness doctrine in *Agins*,[188] *Hodel*,[189] and *Pennell*,[190] but made no mention of the concept in *Keystone*.[191] In an effort to create a more uniform process of decision making in facial regulatory takings challenges, the Court should weigh and balance the following three criteria to determine the suit's ripeness:[192] the property owner's meaningful opportunity for, or the futility of, seeking administrative relief;[193] future, emergent circumstances affected by deciding the particular regulation's validi-

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187. In pursuit of a more uniform application of the ripeness doctrine in the entire regulatory takings area, the proposed criteria could also be used in "as applied" regulatory takings challenges.

188. *See supra* notes 20-29 and accompanying text for a discussion of the *Agins* case.

189. *See supra* notes 43-63 and accompanying text for a discussion of the *Hodel* case.

190. Pennell v. City of San Jose, 485 U.S. 1 (1988). However, the ripeness doctrine was applied at different points of the Court's analysis. In *Agins* and *Hodel*, the doctrine was applied after the Court examined whether the mere enactment of the regulation effected a taking. In *Pennell*, the doctrine was invoked at a point which prevented the Court from analyzing the facial validity of the ordinance.

191. *See supra* notes 64-102 and accompanying text for a discussion of the *Keystone* case.

192. Individual states are under no affirmative duty to abide by federal ripeness requirements. MANASTER & SELMI, *supra* note 29, ch. 68. However, where applicable, federal courts must follow the United States Supreme Court's justiciability rules. *Id.*

The three criteria should be weighed and balanced together. But, since cases may arise where all three cannot apply (such as where no administrative remedy is available), a court may give more weight to one or two separate criterion over the other(s). For example, if the analysis of one criterion dictates unequivocally that the claim is ripe, then this one factor alone may be strong enough for the court to rule that the claim is ripe and then apply the appropriate takings test.

193. Exhaustion of remedies is already a generally applied principle of administrative law. K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.01, at 382-83 (1972). *See also* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938).

Regarding exhaustion of administrative remedies in relation to California facial regulatory takings cases, see K. MANASTER & D. SELMI, *supra* note 29, § 68.32. This treatise also contains a separate discussion of the administrative futility doctrine in California. K. MANASTER & D. SELMI, *supra* note 29, § 68.30(4).

ty; and consideration of whether the case's record can be (or has been) properly supplemented for the Court to rule on the validity of the regulation. Each of the three criteria is further explained below.

First, in deciding the ripeness doctrine's applicability to a specific facial regulatory takings challenge, the Court should consider the landowner's opportunity for, and value of, seeking administrative relief. Previously, the Court included the landowner's opportunity for administrative remedies as part of its ripeness analysis.[194] However, this criterion adds consideration of the futility of the same administrative process to the ripeness equation. After balancing all three of the criteria, if the Court, either retrospectively or prospectively, finds that pursuit of administrative remedies for the particular claimant would be futile, then the Court should rule the claim sufficiently ripe for the *Agins* test to apply.

Don and Bonnie Agins, the appellants in *Agins v. City of Tiburon*,[195] exemplify the relevance of this first criterion. In the years since the Supreme Court decided their suit against the city of Tiburon, the Agins' have learned firsthand of the futility of the city's administrative process. Following the Court's decision that the claim was not ripe since the appellants had yet to apply to build on the property,[196] the Agins' requested permission from the city to subdivide the parcel into five buildable lots.

Together, the city council and the local planning commission considered the Agins' proposal for over five years.[197] After a series of hearings and conferences, the city

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194. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981). The intent is this criterion is not to undermine effective local administrative processes. In the vast majority of instances, it is likely that local administrative bodies could apply local regulations to landowners more efficiently than foreign courts. However, problems arise when local administrative processes fail to pursue legitimate government purposes. *See infra* notes 179-85 and accompanying text for a specific instance of a futile local administrative process (the city of Tiburon's lengthy delay in granting uses for the Agins' parcel). Therefore, this criterion would enable a court of law to intervene and redress a seemingly futile situation.

195. 447 U.S. 255 (1980).

196. *Id.* at 262-63.

197. *See generally* Brief Amicus Curiae in Support of Appellant, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) (No. 85-1199) [hereinafter Amicus Brief].

The author would like to thank Robin Rivett and Tim Bittle of the Pacific

attached a variety of conditions to the proposal, such as the dedication of open space and a hiking trail, an environmental impact report, a traffic study, in lieu fees,[198] and utility connection fees.[199] After enduring five years of administrative delays and spending approximately $560,000[200] to satisfy the city's conditions, the Agins' were finally granted the right to subdivide their property into three lots (not five lots as originally allowed) in October, 1985.

However, just two days before the final subdivision map was recorded, the city council adopted a city-wide building moratorium, which temporarily banned construction in Tiburon. The Agins' administrative delay continued as city voters later extended the moratorium indefinitely.[201] In August, 1988, after a final round of litigation,[202] the Agins' reached a settlement with the City of Tiburon.[203]

As made obvious by the Agins' experience, the Court should consider whether the available administrative remedies will be effective. The Court should weigh this factor on a case by case basis, in light of the specific administrative body responsible for the claimants' land. If subjecting the claimant to the administrative process would prove futile, when balanced against the other two criteria, this factor would support a finding of ripeness and subsequent application of the *Agins* test.

Second, the Court should consider future circumstances affected by ruling on the present claim's validity. Although seemingly difficult, this criterion examines whether a facial regulatory takings challenge requires an actual party in order

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Legal Foundation for their help in gathering information regarding the plight of the Agins' in their struggle to develop their land.

198. In lieu fees are payments made by a landowner to a regulatory body in consideration for the waiver of certain conditions originally attached by the regulatory body to the landowner's proposed development.

199. Amicus Brief, *supra* note 197, at 5.

200. *Id.*

201. *Id.* at 6.

202. Telephone interview with Tim Bittle, Counsel for Don and Bonnie Agins (Jan. 9, 1989). In November, 1985, the Agins', and other similarly situated landowners, filed suit claiming that the enactment of the indefinite building moratorium violated provisions of California's Government Code. The parties jointly sought a form of alternative dispute resolution and a private rent-a-judge decided the suit in the Agins' favor.

203. Telephone interview with Ken Cohen, the Agins' local counsel (Jan. 9, 1989).

to adjudicate the claim successfully. If the Court finds an actual individual unnecessary to address the validity of the regulation, then this criterion should be considered with the other two to determine whether the ripeness doctrine should apply.[204]

Sometimes, such as when a regulation dictates that an appointed individual or regulatory body should apply statutorily-mandated factors at their discretion, an actual individual adversely affected by the regulation is not essential. Since application of the mandated factors would be discretionary, these factors may never be applied to any individual. The facts of *Pennell* provide such an example.

In *Pennell*, as discussed earlier,[205] the city's rent control ordinance specified seven factors, any of which could be used by the hearing officer in ruling on the landlord's proposed rent increase. Thus, a hearing officer could never apply the litigated factor[206] to an actual request for increased rental rates because application was completely discretionary. In short, if a party argues that the enactment of a regulation with discretionary components constitutes a taking, then an actual example of how such a taking occurs should not be needed to adjudicate the matter properly. The "legitimate state interest" strand[207] of the *Agins* test can still apply. Thus, when determining the ripeness of a facial regulatory takings challenge, the Court should determine whether an actual party is needed to rule on the claim's validity.

Third, the Court should consider whether additional facts are available to supplement the record before the Supreme Court. If such relevant facts are available, then the parties should augment the record so that these additional facts can be balanced with the other two criteria to determine the cases's ripeness.

The United States Constitution does not allow the Su-

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204. This criterion should not violate the United States Constitution's (U.S. CONST. art. III, § 2) proscription against advisory opinions because many enacted statutes may never be applied to actual individuals. Such discretionary statutes should still withstand constitutional scrutiny. For an example of the Supreme Court upholding such a discretionary regulation, see Pennell v. City of San Jose, 485 U.S. 1 (1988).

205. *See supra* notes 114-20.

206. *See supra* notes 114-20. In *Pennell*, the litigated factor was tenant hardship.

207. *See supra* notes 22-24 for an explanation of this part of the *Agins* test.

preme Court to issue advisory opinions.[208] Therefore, the Court must limit their cases to only those with an adequate factual basis. Especially with facial challenges of regulatory takings, the Court should have access to a complete factual record before deciding a case.

In *Pennell*, Chief Justice Rehnquist's majority opinion declared, "[w]e strongly suggest that in future cases parties litigating in this Court under circumstances similar to those here take pains to supplement the record in any manner necessary to enable us to address with as much precision as possible any question of standing that may be raised."[209] Thus, the Court should examine the ability of the parties to supplement the record in tandem with the other two criteria when determining the ripeness of a facial regulatory takings claim.

The proposed criteria would not undermine the Supreme Court's discretion in ruling upon a suit's ripeness. The ripeness criteria would act as guidelines for the Court in exercising their inherent discretion.[210] If the Court follows these guidelines, both regulatory bodies and property owners, including counsel for these parties, would greatly benefit. Regulatory bodies would gain knowledge regarding what types of regulations, statutes, or ordinances will withstand facial constitutional scrutiny. Similarly, property owners would know the prerequisite standing requirements for bringing a facial challenge of an alleged regulatory taking. Both

208. U.S. CONST. art. III, § 2.

209. Pennell v. City of San Jose, 485 U.S. 1, 8 (1988).

210. Some may argue that since the ripeness criteria are only guidelines, and not strict requirements, the proposed factors would actually grant the Supreme Court additional discretion in facial regulatory takings challenges. However, this argument ignores the premise of the proposal. In addition to furthering the goal of more clear and consistent judicial decision-making, the ripeness criteria are an attempt to foster increased judicial recognition of three important factors underlying facial regulatory takings challenges–administrative futility, the possibility that certain legislative provisions will never be applied, and the possibility of supplementing the judicial record. Hopefully, increased recognition of these underlying factors would strike the illusive balance between random judicial fiat and dogmatic reliance on ineffective rules of law.

public and private interests would also save millions of dollars they would otherwise spend challenging and defending the validity of land regulations. Finally, the criteria would aid real property attorneys in gathering necessary facts and creating the essential legal arguments for this type of claim.

V. CONCLUSION

Whether owned by a public entity, private individual, or multinational land development corporation, American real estate is too valuable to be governed by inconsistent and vague rules of law. Property owners and government regulatory agencies deserve to know where valid land use regulation ends and a property taking begins. Toward this ultimate goal, these same entities deserve to know when and how litigation in which they are involved becomes ripe for proper adjudication.

Today, the fine line between a valid regulation and an unconstitutional property taking remains ambiguous.[211] As shown by *Agins*, *Hodel*, *Keystone*, and *Pennell*, the line between a ripe and unripe facial regulatory takings challenge is equally ambiguous. With an eye toward developing a concise definition of where a valid regulation ends and a property taking begins, the proposed ripeness criteria seek to add clarity and consistency to an otherwise incomprehensible state of the law. While property owners seek increasingly novel ways of extracting profit from their land holdings and regulatory bodies strive to protect both society and the environment,

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211. For the latest United States Supreme Court cases seeking to define this line, see Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). For the latest action by a Supreme Court Justice on the future of the law in this area, see Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., dissenting).

These recent cases have also earned a response from the executive branch. On March 15, 1988, President Reagan issued Executive Order No. 12,630, "Governmental Actions and Interference With Constitutionally Protected Property Rights" (Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988)). The Order establishes criteria for administrative agencies to follow when granting specific use permits to private landowners and when exerting federal eminent domain power. Executive Order No. 12,630 also seeks to prevent a financial drain on federal funds due to agency action concerning private property. Jackson & Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 ENV'T. L. REP. 10463 (1988). *See also* Marzulla, *The New "Takings" Executive Order and Environmental Regulation: Collision or Cooperation?*, 18 ENV'T. L. REP. 10254 (1988).

the proposed ripeness criteria should enable the law to provide a solid base upon which these competing interests must coexist.

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